

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

3 MIDAS GREEN TECHNOLOGIES,) Docket No. WA 22-CA-050 ADA
4 LLC)
5 vs.) Waco, Texas
6 RHODIUM ENTERPRISES,)
7 INC, ET AL) February 27, 2023

8 TRANSCRIPT OF DISCOVERY HEARING VIA VIDEOCONFERENCE
9 BEFORE THE HONORABLE DEREK T. GILLILAND

10 APPEARANCES:

11 For the Plaintiff: Mr. Michael C. Smith
12 Scheef & Stone, LLP
13 113 East Austin Street
14 Marshall, Texas 75670
15
16 Mr. Henry Pogorzelski
17 K&L Gates, LLP
18 2801 Via Fortuna, Suite 650
19 Austin, Texas 78746
20
21 Mr. Nicholas F. Lenning
22 K&L Gates, LLP
23 925 Fourth Avenue, Suite 2900
24 Seattle, Washington 98104
25
26 Mr. Grant J. Thomas
27 MR. Joseph E. Thomas
28 Thomas, Whitelaw & Kolegraff, LLP
29 18101 Von Karman Avenue,
30 Suite 230
31 Irvine, California 92612
32
33 For the Defendant: Ms. Ashley Ross
34 Kirkland & Ellis, LLP
35 601 Lexington Avenue
36 New York, New York 10022

1 **(Appearances Continued:)**

2 For the Defendant: Mr. Gianni L. Cutri
3 Mr. Gregory M. Polins
4 Kirkland & Ellis, LLP
 300 North La Salle
 Chicago, Illinois 60654

5 Ms. Kathy H. Li
6 Kirkland & Ellis, LLP
7 401 Congress Avenue
 Austin, Texas 78701

8 Transcriber: Ms. Lily Iva Reznik, CRR, RMR
9 501 West 5th Street, Suite 4153
 Austin, Texas 78701
 (512) 391-8792

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25 Proceedings reported by digital sound recording,
transcript produced by computer-aided transcription.

1 (Proceedings commence at 9:30 a.m.)

2 THE COURT: All right. Good morning, everybody.
3 We're here on a discovery dispute and I'm going to start
4 by asking Ms. Copp to call the case.

5 THE CLERK: Yes, your Honor.

6 Calling Case No. WA-22-CV-50, styled, Midas Green
7 Technologies, LLC vs. Rhodium Enterprises, Incorporated,
8 et al. Called for a discovery hearing.

9 THE COURT: All right. Could I get announcements
10 starting with the plaintiff.

11 MR. SMITH: Yes, your Honor.

12 For the plaintiff, Michael Smith, Henry
13 Pogorzelski, Nick Lenning, Joe Thomas and Grant Thomas,
14 and we're ready to proceed.

15 THE COURT: All right. Very good. Good to see
16 you, Mr. Smith, and team.

17 And for defendant.

18 MS. LI: Good morning, your Honor.

19 Kat Li of Kirkland & Ellis on behalf of the
20 Rhodium defendants, and with me, I have Gianni Cutri, Greg
21 Polins and Ashley Ross. And today, Ms. Ross will be our
22 primary speaker and it's her first time before your Honor.

23 THE COURT: All right. Excellent. Well, great
24 to see you, Ms. Li, and team. And welcome, Ms. Ross. I
25 look forward to hearing your argument and presentation

1 today.

2 So I've got a dispute chart with a dispute over
3 essentially three interrogatories; is that correct?

4 MS. ROSS: Yes, your Honor.

5 THE COURT: Okay. Well, let me let you just
6 start with, I guess, the first one. The order I have them
7 in is Interrogatory No. 8, followed by 10, followed by 14.
8 And so, I assume you want to start with No. 8, but just
9 you tell me what order you want to take them in and we'll
10 begin. Oh, and --

11 MS. ROSS: That works for us, your Honor.

12 THE COURT: Okay. Perfect. And also, I have a
13 hard stop at 10:30. We should have plenty of time but
14 just want to make everybody aware of that.

15 MS. ROSS: Thank you, your Honor.

16 As you noted, we're going to take up
17 Interrogatory No. 8 first and that interrogatory seeks the
18 complete factual and legal bases for Midas' damages
19 theories. And as of today, we haven't really gotten
20 anything out of that interrogatory. And their Rule 26
21 disclosures, likewise, haven't given us anything but kind
22 of boilerplate language on the fact that they want actual
23 damages and other damages without any facts or support for
24 that, and that's really not putting us on notice of
25 anything. So we're seeking a fulsome response to this

1 interrogatory request today.

2 And Midas knows how to provide such a fulsome
3 request. And I'd like to refer the Court to Midas' Rule
4 26 disclosures from Immersion litigation, which was the
5 predecessor litigation to this one which Midas alleges
6 Immersion, the company, was a predecessor company to
7 Rhodium, which we don't necessarily agree with. But I'd
8 like to take you through, if I could, a bit about that
9 Rule 26 disclosure because I think it bears on what Midas
10 could have given us here and haven't yet.

11 So if I might be permitted to share my screen on
12 that, your Honor.

13 THE COURT: Certainly.

14 MS. ROSS: I'm sorry, your Honor.

15 THE COURT: It's all right. I don't see anything
16 yet. So -- oh, there we go.

17 MS. ROSS: Okay. So, your Honor, this was a case
18 that was filed back in May 29th of 2020. And the Rule 26
19 disclosures were served on November 25th, 2020, which was
20 a full year before when Midas' expert reports were due in
21 that case. And so, it was a year before expert discovery.
22 And I'd like to take you to where Midas actually provides
23 their disclosure as they're required to on the computation
24 of each category of damages.

25 And it's sufficient -- or it's relevant here

1 because of how much detail Midas provides at this early
2 stage of the litigation from that Midas case. And this
3 was another -- same patents were at issue and they were
4 also accusing Immersion cooling tanks of infringement. So
5 Midas alleges that that case has relevance here and they
6 actually have made accusations as to the relevance of
7 those tanks here. So it's not like a totally different
8 litigation that we're dealing with in terms of the subject
9 matter.

10 So in paragraph 5A, Midas actually provided a
11 reasonable royalty rate. They've provided five percent as
12 a rate and in support of that, they cite to two comparable
13 license agreements, as you can see here. And I'm not sure
14 if you could see my cursor but I'm --

15 THE COURT: I can.

16 MS. ROSS: Okay. Great. And then, so they've
17 actually disclosed what those two license agreements are
18 by Bates number and then, they give a royalty base in the
19 next paragraph. So already we're getting much more
20 information that we have here. And then, in 5C, they give
21 an exemplary calculation as to what the running royalty
22 license would be. And in this case, your Honor, I don't
23 believe they actually asserted lost profits, so this is
24 just really relevant to kind of how much detail they could
25 give us on a reasonable royalty.

1 And then, on paragraph -- actually, I apologize.
2 They actually gave us their actual damages, which they
3 estimated between 1.3 and \$2.6 million. So this was
4 several years ago and already, they had this sort of
5 information in front of them. And if we skip down, they
6 give us a whole bunch of additional information. As you
7 can see, it's still the 457 patent and the 446 patent that
8 were at issue here, and they talk about when that
9 infringement period begins for each of them.

10 And then, in paragraph 12 here, they actually
11 provide witnesses who would be willing to testify or
12 they're going to rely on to support their damages claims.
13 And then, in paragraph 13, they get to the hypothetical
14 negotiation date. Again, all very relevant to -- sort of
15 information that we'd like here and haven't gotten. And
16 then, they talk about apportionment in paragraph 14 here.

17 And then, your Honor, so I'm not belaboring the
18 point, although I'm sure I already have at this point,
19 they continue to talk about the royalty base. And then,
20 at the bottom of this page, they start walking through the
21 Georgia Pacific factors and go so far as to actually talk
22 about the nature of the invention itself, as well, if I
23 can just get to that. Sorry. Keeps going.

24 All right. So they're talking about the nature
25 of the patented invention here and kind of give an

1 overview of that, as well. So the reason why I'm showing
2 this to your Honor is because this is a plaintiff who
3 clearly has the ability to tell the parties that they're
4 suing early in the case what their damages contentions are
5 and can actually walk through a legal analysis of the
6 Georgia Pacific factors to give their factual and legal
7 bases.

8 Now, Midas' factual contention is that this
9 Immersion company, as we said, was -- involved the same
10 technology, but they won't give us any of this sort of
11 information. And why not? It's because of this Stratus
12 Audio case that's what they relied on for this. I think
13 it was before your Honor in November when we were before
14 your Honor last, and they raised it throughout each of the
15 interrogatories today.

16 But sticking with Interrogatory No. 8, they've
17 raised Stratus. And I just -- before we even get to
18 Stratus, I just wanted to align kind of where we were in
19 this case because we were just talking about the Immersion
20 case. So here, it's actually been over six months since
21 we served Interrogatory 8 that was served, I think, August
22 1st of last year. And the Rhodium defendants have now
23 produced financial statements. We've produced SEC filings
24 containing financial information. We've responded to
25 interrogatories substantively telling Midas how many tanks

1 are in operation, how many miners are running in those
2 tanks, and how much wattage those miners are using.

3 And even setting aside what we have provided to
4 Midas, Midas clearly has plenty of information on their
5 own. And if we take the Panduit factors kind of as a
6 outline for what they should be able to give us right now
7 for a lost profits analysis, you know, they should know
8 what the demand for their product is. They claim they
9 have certain tanks that are embodiments of the
10 patents-in-suit, which is what we were before your Honor
11 on in November. So they should know what the demand is.

12 They should be able to identify whether there are
13 non-infringing alternatives in the marketplace beyond
14 anything that defendants are going to produce to them. I
15 mean, I think they should know that. They should be able
16 to set forth their manufacturing and marketing abilities,
17 you know, which is another Panduit factor, as your Honor
18 knows. And to the extent they've identified customers who
19 have foregone their products, they should be able to
20 identify those customers and the amount of lost profits as
21 of now.

22 Now, turning, your Honor, to that Stratus Audio
23 case, which is kind of the basis for why they're saying
24 they shouldn't have to give us anything, they say that's
25 the reason why you can just wait until expert discovery to

1 give us any information. And as I said, they've given us
2 nothing at this point. So I assume your Honor is familiar
3 with that case because it's been raised a couple of times
4 now such that you're aware there was no oral argument in
5 that case. Judge Albright actually cancelled the oral
6 argument. And the interrogatory that was mentioned in the
7 dicta that Midas cites to repeatedly had actually already
8 been answered by the plaintiff in that case, and it was an
9 interrogatory that concerned plaintiff's validity theories
10 there.

11 So that makes the character of that interrogatory
12 immediately kind of distinguishable from here where Midas
13 bears the burden of proof on these issues. It's Midas who
14 has all the information on its damages theories that it
15 wants to set forth. So not only did no party ever
16 actually raise the question of whether another must answer
17 interrogatories typically answered in expert reports, but
18 you know, the type of interrogatory was really different.

19 And there's no hardline rule that we've been able
20 to identify within the OGP that actually precludes
21 interrogatories whose response would include information
22 that an expert would also use in their reports. And I've
23 spoken to Ms. Li, as well, who is very familiar with this
24 district, and we note that folks ask these types of
25 interrogatories all the time. I think one thing that

1 plaintiff pointed out in the discovery dispute chart is
2 that we didn't have Fifth Circuit law on this issue, and I
3 think that's not surprising because people don't take such
4 a hardline position. That's really kind of backwards
5 here, right? So if Midas had its way and if Midas'
6 reading of Stratus was really as strong as they're reading
7 it to be, then we would reach expert discovery, Rhodium,
8 having lost any ability to conduct fact discovery to
9 pressure test Midas' damages theories and facts.

10 So, for instance, if Midas for the first time in
11 their expert report raises a license agreement that we
12 have not -- that they had not previously identified as a
13 comparable license, we will have lost the ability to
14 conduct any fact discovery after as to that license. We
15 can't take any fact depositions. We can't ask additional
16 RFPs. We can't ask additional interrogatories. And so,
17 we've had a -- we'd probably be back here again, your
18 Honor, either moving to strike this information or asking
19 for additional fact discovery, which I think is precisely
20 why courts don't take such a hardline approach.

21 And I also think that's the same reason, your
22 Honor, why this court's OGP requires early contentions as
23 to things like validity -- invalidity, excuse me, and
24 infringement because it provides the parties with a
25 framework and a structure under which they can conduct

1 additional discovery and so that the party that does not
2 bear the burden of proof is put on notice so they know the
3 sorts of things that they need to analyze during the
4 course of fact discovery.

5 So this is -- what I kind of set forth and what I
6 think is kind of the -- and what we think is the proper
7 procedure here, which is to require them to set forth
8 their factual bases now is actually consistent with your
9 ruling at the November 7th conference. And there, you
10 might recall, we had sought from Midas to give us more
11 information on what products Midas contended practice the
12 claims.

13 And your Honor first said at page 18 of that
14 transcript that Midas was essentially going to be cabined
15 or limited to what they've charted when their expert
16 testifies, which I think is the right way to go about
17 this, right? You start with your fact discovery and then,
18 based on that, you can go into your expert discovery. And
19 the Court said additionally at page 20 there, whatever
20 makes it into plaintiff's expert report has to be
21 supported by evidence and statements made during
22 discovery. And I think the same ruling should hold true
23 here and throughout kind of all of these issues and this
24 Stratus Audio defense is one that kind of pervades
25 everything.

1 This is also kind of consistent with Rule 26,
2 which requires a party at the outset of litigation before
3 anything else has happened, before expert discovery is
4 begun, to provide a computation of each category of
5 damages claimed by the disclosing party; and they have to
6 actually make available for inspection and copying the
7 documents that they're going to rely on there.

8 So I think this is all kind of consistent with
9 your prior ruling, the Court's OGP with respect to
10 contentions, and the Federal Rules of Civil Procedure.
11 And really, what we're trying to avoid here, your Honor,
12 is being ambushed at the last minute. And for that
13 reason, as we noted in our discovery chart, what we're
14 asking is for the Court to, number one, overrule Midas'
15 objections with respect to Stratus Audio and, number two,
16 order Midas to respond by providing its damages theories
17 together with those factual bases underlying its theories.

18 And we really would request, your Honor, that we
19 receive this information within a couple of weeks, really
20 within a week if we can, because it's been -- as Judge
21 Albright said at the last hearing, this case is now long
22 in the tooth and we really need the ability to understand
23 what we're arguing about and understand, you know, where
24 we need to go next in fact discovery. Thank you, your
25 Honor.

1 THE COURT: Okay. Let me ask you, Ms. Ross, how
2 -- I assume at this point, you're not wanting defendants
3 to provide you an expert report in response to the
4 interrogatory; is that fair?

5 MS. ROSS: That's fair, your Honor.

6 THE COURT: Okay. So at what point would you --
7 and this is something that I kind of grapple with, so I'm
8 curious for your thoughts on it. At what point is the
9 answer sufficient for discovery but it's not an expert
10 report?

11 MS. ROSS: Well, your Honor, I think that the
12 rule of dis -- 26 disclosure that I just walked you
13 through from November of 2020 is a good guideline for that
14 because that was something that was prior to expert
15 discovery. So I think if they have factual bases at this
16 point, as they did in that Rule 26 disclosure from
17 November 2020, they should set them forth now. I think it
18 -- you know, it is a little challenging because you're
19 taking facts and applying them in an expert report, and
20 so, it might look similar. But they have to give us
21 something and that's why I'm saying that Rule 26
22 disclosure seems like a good guideline for kind of the
23 level of detail they should be giving us.

24 THE COURT: Okay. All right. Thank you, Ms.
25 Ross.

1 Who's going to respond for defendant? Or, I'm
2 sorry, for plaintiff. Mr. Lenning, okay.

3 MR. LENNING: Nick Lenning for plaintiff, your
4 Honor.

5 I'll respond just briefly. I don't think that we
6 really have a dispute here on factual bases. Like you
7 were just saying there, your Honor, that -- I'm sorry, as
8 you said at the earlier hearing -- factual bases, all
9 evidence that's going to be used by experts and expert
10 reports is going to be disclosed in discovery. So I don't
11 think there's any dispute there. What there is a dispute
12 on here, your Honor, is providing an expert report, which
13 is what they're looking for.

14 When they're providing that Rule 26 report from
15 the prior case, which was information that was voluntarily
16 disclosed by prior counsel in a different court, that is
17 information that is typically included in an expert
18 report. We're talking damages models, damages
19 calculations, that we do have an objection to providing at
20 this point because that is quintessentially expert report
21 material.

22 But we don't have an objection to providing
23 factual bases. So the specific reasons that Rhodium asked
24 for this information now is so that it could seek
25 discovery. There's no reason that it can't seek discovery

1 on these items. It already has. So they already --
2 Rhodium already has issued RFPs asking for lost profit
3 documents, already has issued RFPs asking for reasonable
4 royalty documents, comparable licenses. We have been and
5 we will continue to produce that information in discovery.
6 And the information that's in an expert report is going to
7 be information that's produced in discovery.

8 Like, for example, we're not going to be
9 ambushing defendants with a license that was never
10 produced in discovery, trying to use it in an expert
11 report. The -- that really, actually, your Honor, is --
12 basically sums up our entire argument. We don't have any
13 dispute here on factual bases and disclosing things in
14 discovery. We do on providing what they're asking for
15 here, which is the complete legal bases for all of our
16 opinions, which in our -- our position is asking for our
17 expert report.

18 THE COURT: Okay. And as it sits today, I
19 haven't seen the answer to the interrogatory, but to what
20 extent has plaintiff responded to this interrogatory?
21 Have you gone so far as to disclose whether you're seeking
22 lost profits as well as a reasonable royalty or one or the
23 other? Or what disclosure's been made?

24 MR. LENNING: I can't recall what the specific
25 response to the interrogatory is, your Honor, but I will

1 say that we have disclosed that we are seeking both lost
2 profits and reasonable royalty and it's even in our chart
3 responding to this. We believe that we disclosed that in
4 our Rule 26 initial disclosures. It states that we intend
5 to seek both. But to the extent that wasn't clear, it is
6 absolutely clear now. It's in our chart response that we
7 intend to seek both.

8 MS. ROSS: And, your Honor, if I -- if it's
9 helpful to the Court, I actually have that interrogatory
10 response pulled up. I can share it with the Court if
11 that's helpful.

12 THE COURT: Okay. Maybe in just a second, Ms.
13 Ross. But yeah, that would be helpful in just a second.

14 Yeah, Mr. Lenning, yeah, the way I read the chart
15 -- and I'm looking back at it here -- is that the damages
16 claimed will include at least actual damages both past and
17 future and other damages such as special damages,
18 exemplary damages, a reasonable royalty in any amount to
19 which Midas is entitled under 35 U.S.C., Section 284.

20 So what initially struck me about that is it
21 begins to read much like I would have expected in, say, an
22 injury case rather than a patent case. But I don't see
23 the type of specificity, you know, we are seeking
24 reasonable royalty, we are seeking lost profits. At least
25 from my review of the chart, it doesn't even specifically

1 say lost profits.

2 MR. LENNING: We don't have an objection to
3 supplementing and saying exactly that, your Honor.

4 THE COURT: Okay. Let me see -- unless there's
5 anything else, let me see, Ms. Ross, if you will pull up a
6 copy of the interrogatory response.

7 MS. ROSS: Your Honor, can you see my screen now?

8 THE COURT: I can.

9 MS. ROSS: So this is the total of what we've
10 received. And may I respond to what Mr. Lenning just
11 said? Or would you prefer to just take a look at this
12 first?

13 THE COURT: No. Go ahead. Yeah, I've already
14 looked at it.

15 MS. ROSS: There's not much here, your Honor, as
16 you can see. So I think that the issue we're having is --
17 you know, there's a reason why there are both requests for
18 production and interrogatories as forms of discovery tools
19 in cases, and that's because requests for production
20 hopefully results in voluminous productions of materials.
21 But putting together the pieces -- expecting defendants to
22 put together those pieces such that we understand what
23 their theories are and how those licenses, for instance,
24 are applicable, that's what we're missing here, right?

25 So it would not be sufficient to put us on notice

1 to just say we're seeking lost profits or we're seeking a
2 reasonable royalty without any further information. And
3 likewise, I don't think it puts us on notice to just say
4 we've dumped a bunch of documents on you, but we're not
5 going to tell you how they're going to actually apply
6 those, or which of those documents we're actually going to
7 be using, or which of those documents we think are
8 relevant to damages here.

9 So I think that's really the issue here. And I
10 know your Honor had asked again about expert reports, but
11 I don't think applying facts in the way we've asked for
12 them is seeking an expert report here. And I also don't
13 think that just because an interrogatory response might be
14 close to what an expert would also rely on or also opine
15 on is a reason not to give an interrogatory response.

16 THE COURT: Okay. All right. So on this one,
17 what I'm going to do is, I will order plaintiff to
18 supplement its response. When is fact discovery cutoff,
19 Ms. Ross?

20 MS. ROSS: I'm sorry, your Honor, we just moved
21 it, so I haven't -- it's in July 20, your Honor.

22 THE COURT: Okay. Okay. Well, I'm going to give
23 -- order plaintiff to supplement its response within 14
24 days. I will say that I believe plaintiff needs to
25 generally describe the damages being sought and the

1 factual basis for them. And so, to that extent, I think
2 that the interrogatory -- to the extent it calls for a
3 very high level of detail or complete legal and factual
4 basis is too much information requested. And I think the
5 best description I can give at this point is that
6 plaintiff just needs to generally state what it's seeking
7 and the support therefor. The prior Rule 26 disclosures
8 that Ms. Ross showed us definitely, I think, satisfy that
9 requirement and probably go a little beyond what I would
10 consider general statement. But you at least need to say,
11 you know, we're seeking lost profits and here's why, and
12 we're seeking reasonable royalty and here's why it's
13 sufficient to put the defendant on notice of what you're
14 seeking and the general basis for it.

15 And unfortunately, it's hard to draw a
16 black-and-white line between what's sufficient for fact
17 discovery and when it's getting into expert testimony.
18 But -- so because of that, I'm going to say generally, the
19 general description of the damages being sought and the
20 support therefor. And so, with that modification to the
21 interrogatory, I'll overrule plaintiff's objections and
22 order a response within 14 days.

23 Okay. And that takes care of Interrogatory No.
24 1. Now I've got Interrogatory No. 10, the infringement
25 bases for the interrogatory. I will say -- and I've read

1 the parties' charts. I will say that I've always
2 understood infringement contentions to exist essentially
3 to avoid the need for an interrogatory such as this. But
4 with that kind of comment in mind, I'll turn it over to --
5 Ms. Ross, will you argue this one, as well?

6 MS. ROSS: Yes, your Honor, I will.

7 THE COURT: Okay. Go ahead.

8 MS. ROSS: Your Honor, I think the issue here is
9 really what's kind of -- what's missing and whether we
10 approach this as a supplementation of the contentions or
11 the supplement to the rog. It's really getting to the
12 same issue here. And this interrogatory asks for the
13 types of infringement they're alleging.

14 As your Honor might be aware, there are a number
15 of named defendants in this case who have been kind of
16 summarily alleged to have induced infringement or
17 contributed to infringement, and none of that is present
18 in the infringement contentions as to who's doing what, or
19 how they're inducing, or who's contributing to
20 infringement, who's literally infringing, that sort of
21 thing. So that was part of what was sought in this
22 interrogatory request, which I think is laid out in the
23 discovery dispute chart.

24 But more specifically, there is a major issue,
25 which we've raised with Midas as to its factual support

1 for one element that kind of pervades these claims. And
2 Midas again bears the burden on infringement, but we don't
3 understand, and we've told Midas this, what parts of the
4 tanks Midas is alleging meets the control facility. And,
5 your Honor, if I might pull up their -- because the
6 interrogatory response referred back to the infringement
7 contentions, so if I might be permitted to pull up the
8 infringement contentions, I could show you what I'm
9 talking about.

10 THE COURT: Certainly.

11 MS. ROSS: Is your Honor able to see my screen?

12 THE COURT: I can. Yes, ma'am.

13 MS. ROSS: So this is the portion of Midas'
14 infringement contentions and here is set forth the aspect
15 of the claim I'm talking about. It requires a control
16 facility adapted to coordinate the operation of the
17 primary and secondary fluid circulation facilities as a
18 function of the temperature of the dielectric fluid in the
19 tank. And we just cannot tell from what Midas has cited
20 here what they contend the control facility is.

21 They say that the control facility includes an
22 automated controller with software that monitors and
23 controls the pumps, dry coolers, and temperature of the
24 dielectric fluid in the tanks. But number one, they're
25 talking about software and we can't tell what source code

1 they're pointing to. I would note for the Court that our
2 source code we've made available since June 17th of last
3 year and Midas has never taken us up on the repeated offer
4 to come look at it.

5 So I think we're kind of in the same posture that
6 we are with respect to Interrogatory 8 where we are afraid
7 that we're going to get to expert discovery and Midas is
8 suddenly going to come forth with new contentions and new
9 factual support. They've cited in support these SEC
10 filings and then, some of these documents down here, which
11 are over 500 pages long and there's no pincites to them.
12 So we just can't tell what the control facility is.

13 And I think the request here is really to make
14 sure that either Midas is kind of -- they've got what
15 they've got, and as your Honor ordered in November,
16 whatever's in the expert report has to be based on this,
17 what's in their infringement contentions, and you can't
18 kind of come up with new facts or come up with new
19 documents and new information. Or we want it now so that
20 we can understand this and, again, go through discovery
21 and make sure we're pressure testing those theories, as
22 well.

23 THE COURT: Okay. Who wants to respond for
24 plaintiff? Mr. Lenning?

25 MR. LENNING: I will be, your Honor.

1 There's a couple of issues on this one. The
2 first one is that the first time that we read about these
3 deficiencies -- alleged deficiencies was when we received
4 this chart. I know that we have -- Rhodium disputes and
5 asserts that we discussed this on a meet-and-confer. We
6 have a very different recollection of that
7 meet-and-confer. Our -- essentially what we were asked
8 was to provide a complete response with the complete basis
9 as it asked for in Interrogatory No. 10, and to us, this
10 is the exact same issue as before where what they're
11 asking for is our complete legal bases.

12 We are considering supplementing on this control
13 facility limitation that they have pointed out here and
14 we're open to discussing that with Rhodium if they -- to
15 supplement and provide more factual details as they need.
16 But we do object to providing the complete basis, which in
17 our mind and our position is, it seeks the -- essentially
18 an expert report on infringement contentions, your Honor.

19 THE COURT: Okay. With regard to this one, on --
20 with regard to Interrogatory No. 10, what I'm going to
21 order y'all to do is to meet and confer on this one and
22 try and get the additional information, again, keeping in
23 mind my prior comment that I think a general description
24 of the issues at the fact discovery stage is fine.
25 Detailed all factual and legal basis I think gets more

1 towards expert reports.

2 So with that guidance and in light of the fact
3 that I'm going to go with plaintiff's comment that they
4 really hadn't had a full opportunity to address this one,
5 I'm going to order y'all to meet and confer on this one
6 and then, bring it back to the Court if you cannot reach
7 resolution. As you can see, we could get you in and get
8 you a resolution quickly, so hopefully that won't be an
9 issue. But that's going to be the ruling on No. 10.

10 MS. ROSS: If you could just put a timeline on
11 that. I'm sorry, if -- I just am really worried about
12 kind of making sure things move forward because of how
13 long everything's taking. So I don't know what your Honor
14 thinks is reasonable but making sure kind of the parties
15 are moving this along would be really helpful.

16 THE COURT: Yeah. No. I appreciate that and --
17 I mean, I don't see any reason why y'all couldn't have a
18 meaningful meet-and-confer within the next two weeks. I'm
19 not going to order you to meet and confer within two weeks
20 but if you -- obviously that's up to you, Ms. Ross, if you
21 don't reach out to them until two weeks from now, then
22 it's hard for you to say, well, they failed to meet and
23 confer. So it's up to you to push it, which I'm confident
24 you will do, but I don't see any reason why you can't get
25 back and forth -- I don't know everybody's schedules but

1 why you can't have a meaningful meet-and-confer within the
2 next two weeks.

3 MS. ROSS: Okay. Thank you, your Honor.

4 THE COURT: Yeah. That way, you can figure out
5 if there really is an issue or if the plaintiff will agree
6 to give you the answer that solves the issue or not.

7 And so, let's go to No. 14, the secondary
8 considerations. And again, Ms. Ross, will you get to
9 handle this one?

10 MS. ROSS: Yes, your Honor.

11 THE COURT: All right. Go ahead.

12 MS. ROSS: You'll be hearing from me three times
13 today.

14 THE COURT: Excellent.

15 MS. ROSS: So I think the dispute raised with
16 respect to this interrogatory is whether Midas needs to
17 provide its secondary considerations evidence now. I
18 think it's a very similar dispute as with respect to
19 Interrogatory 8. I think -- you know, I just want to make
20 sure I address plaintiff's position in their chart. What
21 plaintiffs say is, they've offered to respond to the
22 interrogatory identifying the secondary considerations
23 they presently believe to be relevant and provide a
24 description of the factual bases for those.

25 And I think the issue here is, you know, we did

1 have a conversation with them back on February 3rd on that
2 with -- and as, actually, on the other interrogatory, too,
3 and kind of laid out what we think is missing as we did
4 with Interrogatory 10, kind of saying this is the element
5 we think is missing with respect to interrogatory. So
6 it's been three weeks since we had that February 3rd
7 meeting, and Midas hasn't given us any supplement, which
8 begs the question of why they have not.

9 So clearly Midas has information, but they're not
10 giving it to us and I think that's because Midas' offer
11 really in their chart is a conditional one. It's
12 predicated on agreeing -- us agreeing that their objection
13 on the basis of Stratus Audio is justified and allowing
14 them to kind of provide only half of an answer and only
15 kind of -- I think the language that makes me nervous is a
16 description of its factual bases rather than the factual
17 bases themselves, right, you know, with the -- I think
18 attorneys are very good at playing with language but a
19 description of the factual bases is not really what we're
20 asking for. We want the actual factual bases.

21 And so, as an example here, if Midas contends its
22 claims led to unexpected results, we need to know what
23 those results were. If they allege that someone copied
24 the invention, we need to know by whom, when, how, kind of
25 what documents they're relying on. If there's a long-felt

1 need that they're saying the claims met, we need to know
2 what that need is and what shows that there was a need.
3 And again, this is all information that should be
4 available to them, especially with respect to things like
5 long-felt need, industry praise, you know, what are they
6 saying is the praise there.

7 And so, again, your Honor, the response that
8 we've gotten so far is with respect to this interrogatory
9 is nothing as you saw with Interrogatory 8. It's the same
10 answer. They just have given us nothing. So it worries
11 me, your Honor, that they have kind of said they would be
12 willing to give us information, but it sounds like they're
13 planning to give us information that would be incomplete,
14 as we read that, and not to the level of detail that they
15 need to provide us to put us on notice of kind of not only
16 like these are the five secondary considerations we're
17 setting forth, but what is your support for those.

18 THE COURT: Okay. Let me hear from plaintiff on
19 this one. Mr. Lenning.

20 MR. LENNING: The offer that we outlined in the
21 chart is not conditional. We haven't provided it because
22 defendants rejected it. So when we met and conferred, we
23 offered to provide the secondary considerations that we
24 believed to be relevant and provide kind of general
25 high-level description of our factual bases for those at

1 this point. But what we objected to, as with the other
2 rogs, was providing our complete factual and legal bases
3 for all contentions regarding secondary considerations,
4 which we, again, believe was for asking for an expert
5 report.

6 We offer that, defendants said no and said that
7 they were going to move to compel the factual and legal
8 bases for those. Plaintiffs remain -- plaintiff remains
9 willing to provide that information and supplement it. We
10 need a little bit of time to put it together, but we could
11 certainly do that within 14 days.

12 THE COURT: Okay --

13 MS. ROSS: Your Honor, if I could --

14 THE COURT: -- Ms. Ross --

15 Ms. Ross: -- clarify, I just want to make sure I
16 clarify the record on something. My apology. It sounded
17 like you were going to ask me a question, as well.

18 THE COURT: No, no, no. I was going to ask if
19 you had a response. So go ahead.

20 MS. ROSS: Yeah. I don't think -- I'm a little
21 confused now, I would say, because if it's not a
22 conditional offer, I'm not sure why they haven't given it
23 to us. I think that the concern we had and as it's set
24 forth in this chart, it doesn't say we're willing to
25 provide this. It's saying, well, Stratus Audio makes it

1 so we don't have to give you the information you're asking
2 for. So it really was unclear to us what they're willing
3 to give us.

4 And I'm not sure why they haven't. It's been
5 three weeks. It sounds like they were ready to, I think,
6 another two weeks. It's just going to cause further delay
7 in this case that's long in the tooth. And so, my concern
8 here, I would request from the Court at least a ruling
9 that their objection as to Stratus Audio is overruled just
10 so that's not hanging out there. It seems like that's the
11 case that keeps popping up over and over again. And on
12 top of that, I think we just want to make sure what we're
13 getting is the factual bases as I've already laid them
14 out.

15 So just to be clear on that meet-and-confer, it
16 wasn't us saying we didn't want what they were going to
17 give us. I think it was saying, well, you need to give us
18 that and more and at least give us -- to us now and it's
19 been another three weeks. So I'm not sure why there was
20 delay there.

21 THE COURT: Okay. So here's what we'll do on
22 this one. I'm going to partially grant plaintiff's
23 request -- or defendants' request, excuse me, and I'm
24 going to order plaintiff to supplement its response within
25 14 days to generally describe your position regarding

1 secondary considerations in support for the secondary
2 considerations you believe apply. But I'm not going to --
3 I'm going to overrule it to the extent that the
4 interrogatory -- I was looking for the language, but to
5 the extent the interrogatory requires in detail all
6 factual and legal bases as that, I think, goes towards
7 expert reports. And when you're drafting your response,
8 Mr. Lenning, this is not part of the order. This is more
9 advisory -- well, and I'll say, to the extent, you know --
10 let me back up.

11 For Stratus Audio, I think that was a specific
12 ruling regarding a specific interrogatory going towards
13 validity, and I don't think it prevents a party from being
14 able to ask and get answers to these types of contention
15 interrogatories.

16 For guidance in responding to it, which I'm sure
17 Mr. Lenning doesn't need me to tell him, but as you're
18 providing your response, if you can keep in mind that to
19 make it a response that had you asked the question you
20 would like to receive, that's one way to look at it. And
21 then, also keep in mind that if Ms. Ross does not like the
22 answer, she's likely to bring it back to me to address.
23 So make it as defensible as possible when you do that.
24 But I do not believe at least that you're required to
25 provide the level of detail sought by all factual and

1 legal bases or similar to what you would put in an expert
2 report; but at least put the defendant on notice of the
3 considerations and the general support for those that you
4 will assert when the time comes.

5 So that will be the ruling on that one. I think
6 that we've reached the end of the chart. So let me start
7 with Ms. Ross. Is there anything else for defendant
8 today?

9 MS. ROSS: No, your Honor. Thank you for your
10 time.

11 THE COURT: All right. Thank you and job well
12 done, Ms. Ross. Next time -- you already sound like a
13 seasoned pro. Next time, you will be a seasoned pro.

14 MS. ROSS: Thank you.

15 THE COURT: And anything else for plaintiff, Mr.
16 Smith, or, Mr. Lenning, or anyone else on the plaintiff's
17 behalf?

18 MR. LENNING: No, your Honor.

19 MR. SMITH: No, your Honor.

20 MR. LENNING: Thank you for your time, your
21 Honor.

22 THE COURT: Thank you all very much and we'll be
23 adjourned.

24 MS. ROSS: Thank you.

25 (Proceedings conclude at 10:09 a.m.)

REPORTER'S CERTIFICATE

I, LILY I. REZNIK, DO HEREBY CERTIFY THAT THE FOREGOING
WAS TRANSCRIBED FROM AN ELECTRONIC RECORDING MADE AT THE
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TRANSCRIPT, TO THE BEST OF MY ABILITY, MADE FROM THE
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER, AND THAT THE
TRANSCRIPT FEES AND FORMAT COMPLY WITH THOSE PRESCRIBED BY
THE COURT AND JUDICIAL CONFERENCE OF THE UNITED STATES,
ON THIS 1st DAY OF MARCH, 2023.

Lily Iva Reznik

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*LILY I. REZNIK, CRR, RMR  
Official Court Reporter  
United States District Court  
Austin Division  
501 West 5th Street, Suite 4153  
Austin, Texas 78701  
(512) 391-8792  
SOT Certification No. 4481  
Expires: 1-31-25*